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## JUSTICE DEPARTMENT SIGNALS INCREASINGLY AGGRESSIVE SCRUTINY OF COLLEGES' AND UNIVERSITIES' REGULATORY COMPLIANCE, WITH HIGH STAKES

In a move that may portend more multi-million-dollar enforcement actions against colleges and universities, the U.S. Department of Justice this month broadly advocated for severe penalties for institutions that knowingly break regulations governing student financial aid. Over the past decade, through the powerful False Claims Act, the federal government has recovered nearly \$200 million from colleges and universities for violations of a single such regulation—a ban on providing incentives to recruiters. Now, in a friend-of-the-court brief filed in a federal appellate court, the Justice Department has outlined a legal theory that could reach a much longer list of regulatory violations.

### Program Participation Agreements

College students may only access federal financial aid if they enroll in an institution that participates in the U.S. Department of Education's federal student aid programs. To participate in such programs, a college or university must execute a program participation agreement (PPA). The PPA recites various regulatory requirements, which the institution promises to follow. The list is long, running for a dozen-plus pages.

The PPA covers a diverse set of regulations. An institution must promise, among other things, to establish a drug abuse prevention policy; to comply with Title VII and Title IX; to avoid charging fees for processing federal student aid applications; to comply with U.S. Department of Education standards of financial and administrative capability; to substantiate any marketing touting job placement rates; to abstain from hiring employees with certain criminal backgrounds; to disclose student athlete graduation rates; and to avoid providing any financial incentive to recruiters based on securing enrollment. Generally, the institution's chief executive officer (*e.g.*, President or Chancellor) signs the PPA.

### False Claims Act Enforcement

As noted, the PPA incorporates a federal ban on paying recruiters any incentive based on the number of students they enroll. That ban has been, over the past decade, the primary focus of the U.S. Department of Justice in anti-fraud actions aimed at both private and non-for-profit colleges and universities, which have resulted in nearly \$200 million in settlements averaging more than \$35 million per institution.

The Justice Department's enforcement tool has been the False Claims Act. That law imposes treble damages on anyone who knowingly causes the government to pay a false claim or makes a false statement material to the payment of a false claim. In pursuing False Claims Act cases against colleges and universities violating the incentive-recruiting ban, the Justice Department has alleged that the ban "is the cornerstone of the federal government's regulation of for-profit colleges." Apart from targeting violations of the ban, there have been enforcement actions targeting gross misconduct, such as fabrication of test results and job

placement statistics. But it has remained unclear whether the federal government would target merely those PPA terms that are “cornerstone[s]” of the regulatory regime or whether it would view each of the PPA’s many provisions as potential triggers for False Claims Act enforcement.

### **Advancement of a Broader Argument**

This month, the Justice Department signaled that it might take a broader view of colleges’ and universities’ False Claims Act liability. In a friend-of-the-court *amicus curiae* brief, the government articulated a legal theory that could transform sundry other PPA terms into triggers for False Claims Act liability.

The appeal was *United States ex rel. Rose v. Stephens Institute d/b/a Academy of Art University*, a case initiated and pursued by a whistleblower against San Francisco-based Academy of Art University. The case, like many before it, argued that alleged violations of the incentive-recruitment ban should trigger False Claims Act liability. The Justice Department filed a brief on August 7, 2017, setting out the government’s view of that argument in the wake of an important Supreme Court case from last year, *Universal Health Services v. United States ex rel. Escobar*.

The Justice Department dutifully noted that the incentive-recruiting ban was a “core” eligibility requirement, but it did not cabin its position based on the ban’s special status among PPA requirements. Instead, the Department argued that institutions “expressly agreed” in the PPA “to comply with the [incentive-recruiting ban] and various other statutory and regulatory requirements,” that these requirements were thus “express prerequisite[s] to receiving” financial aid funds, and that “a claim for payment” would be false in light of a violation of the regulations because it would “impl[y] that the claimant [was] keeping the specific promises that it made to gain initial entry into a program.” By this logic, other PPA provisions could similarly be viewed as triggers for False Claims Act liability.

The False Claims Act, however, also includes a materiality requirement. The Justice Department’s brief leaves room for institutions to demonstrate, under the multi-factor test of materiality laid out in *Escobar*, that violations of other PPA provisions may not be sufficiently material to trigger False Claims Act liability. That argument, however, could prove an uphill battle at the Justice Department. The government’s brief argues that PPA requirements are conditions of payment, a designation “highly probative” “on the question of materiality.” Under the government’s articulated view, whether other PPA provisions may likewise trigger False Claims Act liability may turn on the other factors laid out in *Escobar*, including the degree of the violation and how the government has treated similar violations in other cases.

### **Conclusion**

The Justice Department’s recent brief should serve as a warning to colleges and universities. The severity of False Claims Act liability is unquestionable—it is a multi-million dollar proposition. Yet the extent to which various regulatory violations could trigger False Claims Act liability remains an unknown in the arena of higher education. In the past, the Justice Department has focused primarily on the incentive recruitment ban, but that ban is just one of many provisions within the PPA. Whether the Justice Department will target various other PPA provisions remains to be seen. In the meantime, colleges and universities should seek legal guidance to ensure compliance with PPA provisions and to mitigate liability from any violations.

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